

# MCLE ON THE WEB

(\$15 PER CREDIT HOUR)  
TEST # 38  
1 HOUR CREDIT

To earn one hour of MCLE credit, read the substantive material, then download the test, answer the questions and follow the directions to submit for credit

## **Green Eggs And Spam** *Manage and control unsolicited e-mail by guarding your primary address and using filtering software*

By JIM ROBINSON

It is estimated that 36 percent of all e-mail sent on a given day consists of unsolicited e-mail, otherwise known as "spam." (*For Bulk E-mailer, Pestering Millions Offers Path to Profit*, Mylene Mangalindan, Wall Street Journal, Nov. 13, 2002, citing anti-spam software company Brightmail statistics).

"Spam" is defined in California Business and Professions Code §17538.4 as "unsolicited e-mail documents consisting of advertising material for the lease, sale, rental, gift offer or other disposition of any realty, goods, services or extension of credit" when the documents (a) are addressed to recipients who do not have existing business or personal relationships with the initiator; and (b) were not sent at the request of or with the consent of the recipient. (B&P §17538.4(e)).

Use of the term "spam" arose out of a skit by the British comedy troupe Monty Python, in which a waitress can offer a patron no single menu item that does not include the luncheon meat "Spam." Hormel Food Corporation, the maker of the food product Spam, has dropped any defensiveness, and now celebrates the use of the term. (*Ferguson v. Friendfinders* (2002) 94 Cal.App.4th 1255).

On the low end, unsolicited e-mail is simply annoying. On the high side, spam is expensive to eliminate and those costs are usually passed on to the consumer.

Because spam is usually sent to many recipients at one time at little or no cost to the sender, Internet Service Providers (ISP) incur significant business-related costs accommodating bulk mail advertising and answering consumer complaints.

Recipients of spam expend resources to sort, read and discard unwanted e-mail. If the individual undertakes this exercise at work, employers suffer the financial consequences of the wasted time. Paul Graham, author of *A Plan for Spam*, estimates that five man-weeks are wasted for each million recipients who spend just one second to delete an unsolicited e-mail. ([www.paulgraham.com/spam.html](http://www.paulgraham.com/spam.html), August 2002).

The financial harm caused by the proliferation of unsolicited e-mail has been exacerbated by the use of deceptive tactics, which are used to disguise the sender and the nature of the message.

By disguising the nature and origin of their messages, spammers evade attempts to filter out their messages by ISPs. ISPs incur additional costs attempting to return messages to nonexistent addresses or otherwise dispose of undeliverable messages.

Again, the ISP defrays the cost by passing it on to the consumer.

### **How do they get my e-mail address?**

If your e-mail address has ever been on a web page, web-based bulletin board, or other "usenet newsgroup," it is available to others. Even if you have never posted your e-mail address anywhere on the web, it is still possible for you to get spam. Spammers often use common names with popular domain names (such as bob@aol.com) to send out e-mail.

List merchants can then gather those names that do not bounce back, and sell them to other spammers.

### **What is required to send unsolicited e-mail?**

In much the same way that retailers and businesses use U.S. mail to send potential customers catalogs and advertisements, many businesses are using e-mail messages as a direct marketing tool. It is not illegal to send an unsolicited commercial e-mail.

Many states, including California, have adopted their own laws to control the use of unsolicited e-mail, and there is pending federal legislation on the subject. For a comprehensive overview of state laws on unsolicited e-mail and proposed federal legislation, visit [www.spamlaws.com](http://www.spamlaws.com).

Under California legislation approved in September 1998, unsolicited commercial e-mail messages must contain a

label ("ADV:" or "ADV:ADLT" if it is an adult advertisement) at the beginning of the subject line, as well as opt-out instructions or a toll-free phone number to notify the sender not to e-mail any further unsolicited documents. (Business and Professions Code §17538.4)

The law applies to e-mail that is delivered to a California resident via a provider's facilities located in California. B&P §17538.4(d). A provider may sue a sender of unsolicited commercial e-mail for violating the provider's policies if the sender has actual notice of such policies. (B&P §17538.4(f)(1))

Furthermore, civil penalties (including jail time) can be levied against someone who knowingly sends an e-mail that causes damage to the recipient's computer or data. (California Penal Code §502).

## **What can you do (and should not do) about spam?**

State and federal laws are only "local ordinances" when it comes to regulating spam. Given the global nature of the Internet, spam can originate from any country.

In fact, the Internet Fraud Complaint Center (a partnership between the National White Collar Crime Center and the F.B.I.) tracked Internet fraud in the U.S., including e-mail scams, originating from Nigeria, Romania, South Africa and Australia among many other countries. (IFCC Annual Internet Fraud Report, January-December 2001, pg. 10).

## **Don't buy**

The only true way to get rid of spam once and for all is for all recipients to stop buying what spammers are selling. Spammers are businessmen. They send spam because it works, even though the response rate is abominably low (at best 15 per million compared to 3,000 per million for a catalog mailing). (*A Plan for Spam*, Paul Graham, [www.paulgraham.com/spam.html](http://www.paulgraham.com/spam.html), August, 2002.)

Alas, some people just can't pass up the "golden opportunity" to cut their mortgage payments in half, increase their sex life with a magic pill or to get a college degree with a click of a mouse. Thus, unsolicited e-mail will continue as long as there is a credulous audience for the spammer's message.

## **Discard, don't respond**

Many spammers act like they are complying with unsolicited e-mail laws by including instructions on how to "opt out" of their mailing list. Unfortunately, many senders include these instructions in order to confirm that they have a working e-mail address, not to remove you from their mailings. As such, many dishonest companies treat the "opt-out" button as an "opt-in" button.

These companies can then sell your valid e-mail address to other spammers. Unless you are unsubscribing from a mail distribution list where you know the message sender, the best practice is to discard the unsolicited message without responding.

## **Protect your primary e-mail address**

It is a good practice to guard your e-mail address as you would your phone number. Unless there is a specific reason to give out your main e-mail address to someone other than those you know, consider setting up a free e-mail account through a service such as Yahoo ([www.yahoo.com](http://www.yahoo.com)) or Hotmail ([www.hotmail.com](http://www.hotmail.com)).

Many mail programs, such as Microsoft Outlook, also allow you to set up a second e-mail account. This second e-mail address can then be used if you post messages or when you want to receive information from a company.

## **Know how and to whom to complain**

Many argue that complaining about spamming does not help. Randy Cassingham, author of *Getting Rid of Spam . . . and Other E-mail Pests*, points out that spam victims have complained a lot, and for a long time, but the complaints really don't do anything to stop spam.

Worse, because spammers are good at cloaking their e-mail address, it is difficult to track down the real culprit. ([www.spamprimer.com](http://www.spamprimer.com), Jan. 7, 2003).

If you want to complain, contact the e-mail server's administrator. Before an e-mail ever reaches your inbox, each piece of e-mail must be sent from a "server" run by an ISP. Most server administrators (such as Yahoo or Hotmail) are responsible, and want to know when their machines are being used for spamming.

To contact the server's administrator, first determine the domain of the server. The domain is found after the "@" sign. For example, an e-mail from [buyme@yahoo.com](mailto:buyme@yahoo.com) has a domain of "yahoo.com."

Once you know the domain, e-mail the entire message and your complaint to "abuse@" that domain. For example, if you received a spam from [buythis@hotmail.com](mailto:buythis@hotmail.com), you would send the e-mail and complaint to [abuse@hotmail.com](mailto:abuse@hotmail.com).

The Direct Marketing Association (DMA) also offers a free service, similar to its program for telephone and postal

mailing solicitations, enabling consumers to opt out of unsolicited e-mail.

DMA members are required to purge from their mailing lists all e-mail addresses of consumers who have requested to be removed. More information is available from the DMA at [www.the-dma.org](http://www.the-dma.org).

## **Consider filtering software**

There are a variety of free software programs that you can use to filter spam. Links to these free software sites can be found at <http://freeware.intrastar.net/emailtools.htm>. Many of these software programs such as SPAM PAL ([www.spampal.org](http://www.spampal.org)) allow you to set up "white lists" to allow you to receive e-mail only from known senders, and/or "tag" those with a special header that are unknown.

Microsoft Outlook can also be set up to search for commonly used phrases in e-mail messages and automatically move messages containing these phrases from your inbox to either a junk e-mail folder created by Outlook, to your Deleted Items folder, or to any other folder you specify.

You can also use Outlook to add e-mail senders to the junk mail list and then block those senders.

## **Spam sandwiched**

Most people hate spam worse than eating green eggs. However, as long as people continue to respond to unsolicited e-mail, spamming will continue.

Although it is unlikely spam will be eliminated anytime soon, by guarding your primary e-mail account and using free filtering software, you can do a more effective job in managing unsolicited e-mail.

■ *Jim Robinson is an executive committee member of the Law Practice Management & Technology Section of the State Bar of California and president of JurisPro ([www.JurisPro.com](http://www.JurisPro.com)), a free online expert witness directory that features the curriculum vitae, photo, audio and articles of experts in thousands of categories.*

## **Test**

### **1 Hour MCLE Credit**

1. It is estimated that 36 percent of all e-mail sent on a given day consists of unsolicited e-mail.
2. "Spam" is a term used for unsolicited e-mail that arose out of the use of the term in a Monty Python skit.
3. In California, the definition of "unsolicited e-mail" does not include e-mail advertising for one's services.
4. Under California Business and Professions Code §17538.4(e), if a person requests and is sent an e-mail advertisement by a company with whom he has a prior business relationship, that e-mail is not considered "spam."
5. An e-mail offering to extend credit to someone is never considered an unsolicited e-mail in California.
6. Under California law, the definition of unsolicited e-mail does not include e-mail regarding the lease of realty.
7. It is estimated that five man-weeks are wasted for each million recipients who spend just one second to delete an unsolicited e-mail.
8. It is possible for a person to receive unsolicited e-mail even if their e-mail address has never been listed anywhere on the Internet.
9. It is illegal to send unsolicited commercial e-mail.
10. There is current pending federal legislation on the use of unsolicited e-mail.
11. Under California legislation, it is not necessary for unsolicited commercial e-mail sent within California to contain opt-out instructions or a toll-free phone number to notify the sender to stop sending further unsolicited e-mails.
12. Pursuant to the California Business and Professions Code, unsolicited commercial e-mail sent within California must contain the label "ADV:" (or "ADV:ADLT" if it is an adult advertisement) in the subject line.
13. Business and Professions Code §17538.4(d) applies to e-mail that is delivered to a non-California resident from a facility outside of California.
14. Under California law, a person who knowingly sends an e-mail that causes damage to the recipient's computer or data can be subject to civil penalties and/or jail time.
15. An Internet Service Provider may sue a sender of unsolicited commercial e-mail for violating the provider's policies if the sender has actual notice of the provider's policies.
16. The Internet Fraud Complaint Center is a partnership between the National White Collar Crime Center and the F.B.I.
17. Senders of unsolicited e-mail often "cloak" their e-mail address to make it difficult to track the identity of the sender.
18. Before an e-mail reaches a person's inbox, each piece of e-mail must be sent from a "server."
19. Members of the Direct Marketing Association are not required to purge from their mailing lists all e-mail addresses of consumers who have requested to be removed.
20. Using e-mail filtering software to set up a "white list" allows a person to receive e-mail only from known senders, and/or tag those with a special header that are unknown.

### **Certification**

- This activity has been approved for Minimum Continuing Legal Education credit by the State Bar of California in the amount of 1 hour.
- The State Bar of California certifies that this activity conforms to the standards for approved education activities prescribed by the rules and regulations of the State Bar of California governing minimum continuing legal education.

# MCLE ON THE WEB

## TEST #38 — Green Eggs And Spam

### 1 HOUR CREDIT

- Print the answer form only and answer the test questions.
- Mail only form and check for \$15 to:

MCLE ON THE WEB — CBJ  
The State Bar of California  
180 Howard Street  
San Francisco, CA 94105

- Make checks payable to State Bar of California.
- A CLE certificate will be mailed to you within eight weeks.

---

Name

---

Law Firm/Organization

---

Address

---

State/Zip

---

State Bar Number (Required)

- |                      |                      |
|----------------------|----------------------|
| 1. True___ False___  | 11. True___ False___ |
| 2. True___ False___  | 12. True___ False___ |
| 3. True___ False___  | 13. True___ False___ |
| 4. True___ False___  | 14. True___ False___ |
| 5. True___ False___  | 15. True___ False___ |
| 6. True___ False___  | 16. True___ False___ |
| 7. True___ False___  | 17. True___ False___ |
| 8. True___ False___  | 18. True___ False___ |
| 9. True___ False___  | 19. True___ False___ |
| 10. True___ False___ | 20. True___ False___ |